STARE DECISIS ON THIN ICE: MULLING OVER THE SUPREME COURT AFTER *RAMOS V. LOUISIANA*

Min K. Lee[*]

Among the many events that made the year 2020 so memorable were the passing of Justice Ruth Bader Ginsburg and ensuing confirmation of Justice Amy Coney Barrett to the Supreme Court. Much was made of Justice Barrett's judicial philosophy during her confirmation hearings, with many critics focusing on her commitment to an originalist reading of the Constitution, as well as her treatment of precedent. Ramos v. Louisiana was the only case that directly overturned constitutional precedent during the Court's previous term. In light of this holding, her judicial views, especially her belief that originalism does not conflict with stare decisis because the former requires a judge to adhere to the "ultimate precedent" in the Constitution, might put the already tenuous status of stare decisis in greater jeopardy. Confusingly, in Ramos a majority of the Court's Justices held that the Sixth Amendment requires a unanimous jury for felony convictions in state courts, but failed to reach agreement on whether there was an applicable precedent in the form of Apodaca v. Oregon. As a result, the majority opinion invited several concurring opinions that disagreed with the treatment of Apodaca by certain Justices comprising the majority, and one acerbic dissenting opinion. To assess how Justice Barrett might fare in the Court's post-

[*]J.D., 2015, NYU School of Law. B.A., 2011, Johns Hopkins University. Member of the Massachusetts Bar. Associate, Yulchon LLC.

Ramos jurisprudence, this Article examines Ramos's majority, concurring, and dissenting opinions. Then, based on her relevant academic writings and judicial opinions on stare decisis and constitutional law, this Article speculates about how Justice Barrett might have voted in Ramos had she been a member of the Court at that time.

I. Introduction

Consider the following: A jury in a Louisiana state court votes 10-2 to convict a man of murder. The individual appeals his conviction on the basis that Louisiana's law permitting nonunanimous juries to hand out felony convictions violates the Sixth Amendment to the United States Constitution. The case eventually reaches the Supreme Court, and the nine Justices find themselves facing one of two possible choices. First, they can vote to overturn the conviction by striking down Louisiana's law as unconstitutional. To do so, they would have to confront a prior decision that acknowledged the validity of such laws, but conveniently there is ample evidence to support the view that the Sixth Amendment requires unanimous juries for felony convictions, proving the Court's prior decision was an anomaly. Alternatively, the Justices could resign the man to his fate with little effort or justification by simply invoking the doctrine of stare decisis.

This was the precise situation the Court faced in the 2020 case of *Ramos v. Louisiana*.[1] Logic suggests that the Court's Justices would have voted along their ideological lines. A popular narrative, after all, is that "all Democrat-appointed Justices are reliably liberal and all Republican-appointed Justices are reliably conservative."[2] Yet, the actual holding of *Ramos* was unusual to say the least; the Justices put forth sharply conflicting understandings of the principle of stare decisis in a 6-3 decision, which consisted of several vigorous concurring opinions and one dissenting opinion.[3]

The murkiness surrounding the principle of stare decisis and its application was thus made evident in *Ramos*. The end result was that a

[1] Ramos v. Louisiana, 140 S. Ct. 1390, 1393-1395 (2020).

[2] Daniel Epps & Ganesh Sitaraman, *How To Save the Supreme Court*, 129 YALE L.J. 148, 156 (2019).

[3] As summarized in *Ramos*'s syllabus, only the late Justice Ginsburg and Justice Breyer joined all parts of Justice Gorsuch's majority opinion, with Justice Sotomayor and Justice Kavanaugh joining different parts of the majority opinion and Justice Thomas only agreeing with the judgment. The three concurring Justices filed separate opinions, whereas Justice Alito, joined by Justice Roberts and Justice Kagan, issued a dissenting opinion. *Ramos*, 140 S. Ct. at 1392.

remarkably fractured Supreme Court struck down Louisiana's law at issue, decided that the scope of the Sixth Amendment guaranteed the constitutional right to a unanimous jury to be convicted for serious crimes in state courts, and incorporated the provision through the Due Process Clause of the Fourteenth Amendment.[4] In doing so, the six Justices who agreed on the outcome had the aforementioned choice of directly overturning the Court's prior holding in *Apodaca v. Oregon*.[5] But even those six Justices failed to reach an agreement in a rather spectacular fashion, with Justice Gorsuch along with two other Justices refusing to acknowledge *Apodaca*'s validity. At the other end, led by Justice Alito, the three dissenting Justices vehemently defended *Apodaca* on the basis of stare decisis, emphasizing the necessity to uphold what they deemed to be applicable precedent.[6]

Put this way, the result of *Ramos* may seem somewhat reasonable. As this Article explains, however, Justice Gorsuch's reasoning in *Ramos* might pose significant risks to the doctrine of stare decisis when exercised by the Court later down the road. And any cracks in the logical basis behind stare decisis created by *Ramos* could very well worsen in the future thanks to Justice Amy Coney Barrett's confirmation to the Court. This is because of her unique—and perhaps troubling—view that there exists a pragmatic harmony between originalism and stare decisis—the former requires judges to abide by the ultimate precedent: the originalist interpretation of the Constitution. This Article accordingly argues that given the ideological disagreements between the current Justices of the Court, stare decisis will be a woefully inadequate shield for defending the Court's previous jurisprudence moving forward. Then, based on Justice Barrett's previous writings and opinions, this Article concludes by predicting how Justice Barrett might have voted in *Ramos*.

II. Understanding *Ramos*

A. THE SIXTH AMENDMENT AND *APODACA*: A PRELUDE TO *RAMOS*

To properly understand *Ramos*, we must head to the very beginning by turning to the text of the Sixth Amendment of the Bill of Rights, which states:

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[4] *Ramos*, 140 S. Ct. at 1397 (concluding that "if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.").

[5] *See* Apodaca v. Oregon, 406 U.S. 404 (1972).

[6] *Ramos*, 140 S. Ct. at 1425-26 (Alito, J., dissenting).

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[7]

As is the case with most debates and disagreements in the realm of constitutional law, nearly each word of the Sixth Amendment is subject to some level of ambiguity and disagreement. With the slightest stretch of imagination and minimal creativity, any two lawyers are capable of engaging in grueling debates regarding the respective meaning of the eighty-one words comprising the Sixth Amendment, which has, in fact, been thoroughly argued in the courts.[8] With respect to *Ramos* the particular word at issue was the term "impartial."[9] Indeed, what does it mean for a jury to be impartial? Because the text of the Sixth Amendment does not offer much, if any, guidance on this issue, the role of the jury as practiced in common law might provide much-needed assistance in deciphering what the term was intended to mean.[10]

The common law understanding of the term "impartial" appears to have incorporated a number of different meanings, one of which was the firm requirement of juror unanimity for a defendant to be criminally convicted in court.[11] Those meanings, however, were not all included in the Sixth Amendment, and through the doctrine of selective incorporation, the Court incorporated most, but not all, of the protections within the Bill of Rights through the Due Process Clause of

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[7] U.S. CONST. amend. VI.

[8] Other than the right to trial by an impartial jury, the persisting legal issues surrounding the Sixth Amendment include the right to confront and cross-examine witnesses, compulsory process to obtain defense witnesses, and assistance of counsel. BURT NEUBORNE, *An Overview of the Bill of Rights*, *in* FUNDAMENTALS OF AMERICAN LAW 83, 109 (Alan B. Morrison ed., 1996).

[9] *Ramos*, 140 S. Ct. at 1395 (stating that "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial.").

[10] Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 990 (2010) (explaining that the text of the Sixth Amendment "does not on its face help us decide what a jury is, or what it means to be tried by one.").

[11] *Apodaca*, 406 U.S. at 407-08 (finding "the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century.").

the Fourteenth Amendment.[12] This practice was adopted as opposed to total incorporation.[13] It logically follows that parts of the original meaning were dropped along the way, as the common law understanding of an impartial jury traveled to state courts.

Nevertheless, state courts' actual practices regarding the jury system for felony trials before and after the ratification of the Sixth Amendment, including the requirement for unanimity, seem to have been fairly consistent throughout early American legal history. The established facts indicate that the jury system referred to "twelve lay persons, who reached their verdict unanimously, and passed upon both fact and the law."[14] Sadly, heightened racial tensions, especially during and following the Reconstruction period, disrupted the common law understanding of a jury trial.[15] As black jurors appeared in courtrooms, attacks on them followed, centered on accusations that they were likely to be more lenient toward defendants than white jurors.[16] In the long run this chain reaction gave birth to Louisiana and Oregon's problematic laws that permitted felony convictions by nonunanimous juries.[17] In retrospect, the historical background of nonunanimous jury provisions leaves little doubt that they were passed for racist reasons notwithstanding their facially and purportedly race-neutral language.[18]

Then came *Apodaca* and its sister case *Johnson v. Louisiana*.[19] At issue in *Apodaca* was whether the Sixth Amendment permitted felony convictions by nonunanimous juries in state courts.[20] Since both Louisiana and Oregon had legislation that did not mandate jury unanimity to render felony convictions in place, the Court was asked to address the constitutionality of such laws that enabled nonunanimous verdicts to stand.[21]

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[12] Aliza B. Kaplan & Amy Saack, *Overturning Apodaca v. Oregon Should be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 21-22 (2017).

[13] Richard J. Hunter, Jr. & Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 OKLA. CITY U. L. REV. 365, 374-75 (2010).

[14] Larsen, *supra* note 10, at 998.

[15] Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1641 (2018) ("[R]acial prejudice has always infected American's criminal jury system.").

[16] *Id.* at 1603.

[17] *Id.* at 1612 ("The broader political context, however, helps demonstrate how the adoption of nonunanimous verdicts in particular was motivated by racial bias.").

[18] *See id.* at 1612-14, 1616-20.

[19] Johnson v. Louisiana, 406 U.S. 366 (1972).

[20] *See generally Apodaca*, 406 U.S.

[21] *Id.* at 411 (summarizing the petitioners' claim as arguing that the Sixth Amendment requires "a unanimous jury verdict in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause.").

In *Apodaca*, four Justices ultimately found juror unanimity to be required by and applicable to state courts through the Sixth Amendment, whereas four other Justices performed what was essentially a cost-benefit analysis to conclude that juror unanimity could not be imposed on state courts.[22] Stuck between those two irreconcilable views, Justice Lewis F. Powell Jr. concluded that while the requirement of juror unanimity did form part of the Sixth Amendment, the notion had not been fully incorporated with respect to state courts, and Oregon's law was therefore not inconsistent with the Due Process Clause.[23] As such, the Constitution did not preempt states from convicting felony crimes by nonunanimous juries.[24]

In a civil or hybrid legal system, *Apodaca* might have mattered less than it did in the U.S. common law system. Being an obvious outlier in the Court's jurisprudence,[25] perhaps *Apodaca* would not have carried any binding precedential force.[26] But in a common law system such as the U.S., *Apodaca* allowed Louisiana and Oregon to retain their preexisting laws, and permitted other states to potentially follow suit.[27] At a minimum, the impact of this case was substantial in Louisiana and Oregon.[28] In the latter, for example, a significant number of felony

[22] *Id.* (explaining that a requirement of unanimous juries would cause an increase in the number of hung juries when nonunanimous juries can sufficiently protect a defendant's rights).

[23] Justice Powell's concurring opinion was rendered as part of *Johnson v. Louisiana*. *Johnson*, 406 U.S. at 371, 375 (explaining that even though the Sixth Amendment requires unanimous juries for criminal convictions in federal courts, "there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards.").

[24] *Id.*

[25] The Court called *Apodaca* an exception, created by an unusual split between the Justices, to the general rule that the Fourteenth Amendment does not apply to the states as a "watered-down, subjective version of the individual guarantees of the Bill of Rights." The Court added that "[o]nly a handful of the Bill of Rights protections remain unincorporated." McDonald v. City of Chicago, 561 U.S. 742, 765, n.14 (2010).

[26] Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519, 524 (2006) ("Under *jurisprudence constante* doctrines a judge is not bound by a single decision in a single previous instance. Authoritative force stems from a consolidated trend of decisions on a certain point. The practice of the courts becomes a source of law when it matures into a prevailing line of precedents.").

[27] There is a counterargument that the theoretical basis of common law does not recognize an individual case as a final rule of law. Graham Hughes, *Common Law Systems*, *in* FUNDAMENTALS OF AMERICAN LAW 9, 18 (Alan B. Morrison ed., 1996).

[28] In both states, individuals were convicted by nonunanimous juries only to be eventually exonerated. *See generally* Zoe Chevalier, *The Prisoners Who Were Convicted by Hung Juries*, THE NATION (Oct. 8, 2020), https://www.thenation.com/article/society/louisiana-non-unanimous-juries/; Conrad

convictions were reached by nonunanimous jury verdicts until *Ramos* was rendered,[29] and all of this was in spite of legitimate concerns and issues surrounding the conduct of nonunanimous juries.[30] For a decision that the Court subsequently referred to as "one exception to this general rule,"[31] *Apodaca* had far more than a tangential impact on individual constitutional rights.

B. RAMOS V. LOUISIANA

Given the confusion and chaos that was *Apodaca*, ironically, *Ramos* may very well be a worthy successor. At the outset, the Court's holding in *Ramos* seems simple enough: six Justices voted—against the dissent of three of their colleagues—that the Constitution requires convictions by unanimous juries for serious crimes in state courts, effectively setting aside *Apodaca* for good.[32] But as this Article explains, *Ramos* is anything but simple.

In *Ramos*, the petitioner, Evangelisto Ramos, was convicted of second-degree murder by a 10-2 jury verdict in Louisiana and sentenced to life in prison.[33] The petitioner appealed his conviction, first to the Fourth Circuit, and then to the Supreme Court, arguing that Louisiana's law was problematic because it permitted convictions by a nonunanimous jury for a felony; this law, he argued, contravened his constitutional right to an impartial jury under the Sixth Amendment.[34] The Court found that the Sixth Amendment incorporated the common law practice of juror unanimity in the term "trial by impartial jury," and

Wilson, *Exonerations Raise Questions About Oregon's Controversial Jury System*, OREGON PUBLIC BROADCASTING (Sept. 20, 2018), https://www.opb.org/news/article/oregon-non-unanimous-juries-exonerations.

[29] The specific percentage was in excess of forty percent. Kaplan and Saack, *supra* note 12, at 19.

[30] Kaplan and Saack, *supra* note 12, at 33-34 (explaining that jurors are more likely to sympathize with similar defendants whereas nonunanimous juries are also more likely to be verdict-driven than unanimous juries). There was also evidence indicating that nonunanimous juries eschewed accuracy and thoroughness of in favor of efficiency. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1273 (2000) (stating that "empirical research alerts us to the fact that majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable.").

[31] McDonald v. City of Chicago, 561 U.S. 742, 765, n.14 (2010).

[32] *Ramos*, 140 S. Ct. at 1390, 1397.

[33] Evangelisto Ramos's conviction was in June 2016. Louisiana subsequently amended its state constitution in 2018 to eliminate felony convictions by a nonunanimous jury, but the amendment only applied to crimes committed on or after January 1, 2019. *Id.* at 1419 (Kavanaugh, J., concurring).

[34] The Fourth Circuit judgment contains additional factual details surrounding the crime and trial of Evangelisto Ramos. They have been omitted here in order to focus on the topic. *State v. Ramos*, 231 So.3d 44, 46-50 (2017).

that this right applied to both federal and state courts through the Due Process Clause of the Fourteenth Amendment, thereby striking down Louisiana and Oregon's laws.[35] The path Justice Gorsuch took and his specific reasoning, however, may have laid the groundwork for an uncertain future for the principle of stare decisis as it is exercised by the Court.

Noting that juror unanimity had long been required in both state and federal criminal cases,[36] Justice Gorsuch, writing for the majority, pointed to *Apodaca* as an obvious outlier based on which Louisiana and Oregon's laws had been allowed to stand.[37] And *Apodaca* logically had to mean either that "the Sixth Amendment allows nonunanimous verdicts, or the Sixth Amendment's guarantee of a jury trial applies with less force to the States under the Fourteenth Amendment."[38] Peculiarly, Louisiana itself did not argue for *Apodaca* to apply as binding precedent, but instead asserted that juror unanimity had been intentionally carved out of the Sixth Amendment by way of a revision to its text,[39] or was simply not important enough to be included in the first place.[40] The majority rejected both arguments.[41] Eschewing any urge to subject unanimity to a functionalist analysis—akin to what one faction of the *Apodaca* court had done—the majority limited its reasoning to the acknowledgement that the Sixth Amendment unequivocally required unanimous verdicts for felony convictions.[42]

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[35] *Ramos*, 140 S. Ct. at 1397 (concluding that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.").

[36] *Id.* at 1396-97 (explaining that juror unanimity was universally accepted throughout American legal history and the Court had consistently confirmed it prior to *Apodaca*). For a criticism of Justice Gorsuch's analysis of the historical and universal acceptance of jury unanimity, *see generally* Nicholas M. Mosvick and Mitchell A. Mosvick, *The Heller-ization of Originalism: Ramos v. Louisiana and the Problem of Frozen Context*, 2020 CATO SUP. CT. REV. 309 (2020).

[37] *Ramos*, 140 S. Ct. at 1399 (noting that with respect to *Apodaca*, "no one has found a way to make sense of it.").

[38] *Id.* at 1398.

[39] Specifically, Louisiana argued that explicit references to unanimous verdicts had been removed from James Madison's original proposal by the Senate. In response, the majority pointed to the removal possibly being due to language surplusage and implications regarding other removed terms as the basis for rejecting Louisiana's view. *Id*. at 1400. It should be noted that the *Apodaca* plurality found the explanation "that the deletion was intended to have some substantive effect" to be more convincing than the counterargument. *Apodaca*, 406 U.S. at 410.

[40] *Ramos*, 140 S. Ct. at 1400-01.

[41] *Id.* at 1401-02.

[42] *Id.* at 1402 ("[A]t the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict.").

To address Justice Alito's dissenting opinion, the majority then addressed the elephant in the room: did Justice Powell's concurring opinion in *Apodaca* deserve the benefit of the doubt per the principle of stare decisis?[43] Here, three of the Justices answered in the negative and subsequently rejected Justice Powell's reasoning.[44] Regarding how to approach a plurality opinion, Justice Gorsuch parted with the dissent on how to read *Marks v. United States*,[45] which had held that where fewer than five Justices agree on a given case, the "position taken by those Members who concurred in the judgments on the narrowest grounds" shall be deemed to be the holding.[46] According to the dissent, irrespective of the fractured nature of the decision, the *Marks* rule awarded precedential force to *Apodaca* even without the agreement of a majority of the Court.[47] Justice Gorsuch, Justice Breyer, and Justice Ginsburg argued, in contrast, that *Marks* did not apply to Justice Powell's opinion at all.[48] This was because both the plaintiff and the defendant in this case agreed that Justice Powell's opinion carried no precedential force since the basis for that opinion was the consistently rejected dual-track rule of incorporation.[49] As its secondary argument, the dissent argued for the precedential effect of Justice Powell's opinion with respect to at least the result.[50] But Justice Gorsuch was unwilling to validate the result of Justice Powell's opinion without also taking its reasoning into account and dismissed this argument as well.[51]

In the next section of *Ramos* the majority reasoned that even if *Apodaca* had precedential force, the Court would nevertheless be

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[43] *Id.* at 1402 (casting doubt on the notion that "a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.").

[44] *Id.* at 1430 (Alito, J., dissenting). Only Justice Gorsuch, Justice Ginsburg, and Justice Breyer agreed on this part. To the dissent, this was a baffling assertion, especially since the Court had denied certiorari to a number of similar cases following *Apodaca*. *Id.* at 1429 (Alito, J., dissenting) ("The idea that *Apodaca* was a phantom precedent defies belief."). But, the Court had previously stated that "those denials have no precedential significance." *McDonald*, 561 U.S. at 868.

[45] Marks v. United States, 430 U.S. 188 (1977).

[46] *Id.* at 193.

[47] *Ramos*, 140 S. Ct. at 1430 (Alito, J., dissenting) ("This rule ascribes precedential status to decisions made without majority agreement on the underlying rationale, and it is therefore squarely contrary to the argument of the three Justices who regard *Apodaca* as non-precedential.").

[48] Justice Gorsuch declared that "*Marks* has nothing to do with this case." *Id.* at 1403.

[49] *Id.* (pointing out that "both sides admit that Justice Powell's opinion cannot bind us").

[50] *Id.* at 1404.

[51] *Id.* at 1404 (dismissing Justice Alito's argument for distinguishing between *Apodaca*'s result and reasoning because "stripped from any reasoning, its judgment alone cannot be read to repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments.").

compelled to overturn it, especially since the principle of stare decisis is at its weakest when deliberating questions of constitutional law.[52] Consistent with the traditional framework for determining whether to overturn precedent, the Court considered the following factors: "the quality of the reasoning behind the decision at issue, consistency between it and related decisions, legal developments since the decision was rendered, and reliance on the decision."[53] Applying this framework, the Court's analysis was rather straightforward. Both the reasoning behind the *Apodaca* plurality opinion and Justice Powell's opinion were poor because they were "gravely mistaken," and *Apodaca* was inconsistent with case law prior and subsequent to its rendering, thereby allowing the majority to move on to the issue of reliance interests.[54]

Here, in addition to vociferously disagreeing with the majority's treatment of *Apodaca*, Justice Alito further expressed concern that a significant number of defendants convicted of felonies in Louisiana and Oregon by nonunanimous juries would challenge their convictions, which would unduly burden those states because they would be forced to retry many of the pending cases.[55] In that regard, Louisiana and Oregon were relying on *Apodaca* remaining good law to assure the finality of the cases that would be affected by the majority's decision.[56]

The majority once again disagreed, reasoning that new rules of criminal procedure inevitably affect pending cases to some extent.[57] If anything, the majority expected the *Ramos* decision to cause less disruption than other previous decisions on criminal procedure.[58] More importantly, because *Teague v. Lane*[59] prohibits retroactive application of rules of criminal procedure unless accepted as "watershed rules," the majority surmised that the impact of its holding in *Ramos* would be

[52] On the contrary, stare decisis is at its strongest in the realm of statutory law. Amy Coney Barrett, *Statutory Stare Decisis in the Court of Appeals*, 73 GEO. WASH. L. REV. 317 (2005) [hereinafter Barrett, *Statutory Stare Decisis*].

[53] *Ramos*, 140 S. Ct., at 1405.

[54] *Id.* at 1405-06.

[55] This is likely to happen because Oregon handed out felony convictions by nonunanimous juries in more than forty percent of all jury cases. Kaplan and Saack, *supra* note 12, at 19.

[56] *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

[57] *Id.* at 1406.

[58] *Id.* at 1406-07 ("Our decision here promises to cause less, and certainly nothing before us supports the dissent's surmise that it will cause wildly more, disruption than these other decisions.").

[59] Teague v. Lane, 489 U.S. 288 (1989).

narrowly limited in scope.[60] The reliance interests of Louisiana and Oregon would be adequately addressed in a future case involving the question of whether the majority's new rule passes the *Teague* threshold.[61] Ultimately, the majority concluded that the American people's reliance in their constitutional liberties prevailed over whatever interest Louisiana and Oregon held in maintaining *Apodaca* as good law.[62]

C. CONCURRING OPINIONS

Justice Sotomayor, agreeing with all parts of Justice Gorsuch's opinion except for its view on whether *Apodaca* was precedent, concurred in the opinion and offered scathing criticisms of *Apodaca* by listing three grounds on why it should be overturned.[63] First, *Apodaca* directly violated well-established strands of constitutional precedent.[64] Second, *stare decisis* should be most respected in cases involving property and contract rights, but no such rights were implicated here.[65] Finally, because of their racist context, the laws of Louisiana and Oregon together with *Apodaca* should be "relegated to the dustbin of history."[66]

In his concurrence, Justice Thomas opined that the Court's prior interpretation of the Sixth Amendment's requirement for jury unanimity was permissible in light of the available evidence.[67] Justice Thomas then, however, criticized the Court's reliance on the Due Process Clause of the Fourteenth Amendment and instead argued for application of the Privileges or Immunities Clause.[68] To Justice Thomas, "[d]ue process incorporation is a demonstrably erroneous

[60] *Id.* The dissenting Justices voiced concern that the mere possibility of retroactive application would cause an undue burden. *Ramos*, 140 S. Ct. at 1437 (Alito, J., dissenting) ("As long as retroactive application on collateral review remains a real possibility, the crushing burden that this would entail cannot be ignored.").

[61] *Id.* at 1407. It appears that this question will be answered shortly, as the Court is currently reviewing whether the *Ramos* rule passes the *Teague* threshold. Amy Howe, *Case preview: Justices will hear argument on whether unanimous jury ruling applies retroactively*, SCOTUSBLOG (Dec. 1, 2020), https://www.scotusblog.com/2020/12/case-preview-justices-will-hear-argument-on-whether-unanimous-jury-ruling-applies-retroactively/.

[62] *Ramos*, 140 S. Ct. at 1408.

[63] *Id.* at 1408 (Sotomayor, J., concurring).

[64] *Id.* at 1409 (Sotomayor, J., concurring).

[65] *Id.* (Sotomayor, J., concurring).

[66] *Id.* at 1410 (Sotomayor, J., concurring). The dissent countered the third ground by casting doubt on the connection between the allegedly racist context and constitutional law and arguing that both states readopted their rules for policy-related but non-racist grounds. *Id.* at 1426-27 (Alito, J., dissenting).

[67] *Id.* at 1424 (Thomas, J., dissenting).

[68] *Ramos* 140 S. Ct. at 1424 (Thomas, J., dissenting).

interpretation of the Fourteenth Amendment."[69] Further, since in his view, *Apodaca* also erroneously concerned the Due Process Clause, Justice Thomas would have corrected the alleged error by assessing the issue under the Privileges or Immunities Clause.[70]

In his concurring opinion, after emphasizing that "no one advocates that the Court should *always* overrule erroneous precedent," Justice Kavanaugh offered a three-factor test for determining when to overturn precedent.[71] Before all else, Justice Kavanaugh vouched for the need to respect precedent noting that even if stare decisis is relatively weaker in the context of constitutional cases, as opposed to statutory cases where the legislative branch can correct its own statutes, "adherence to precedent is the norm" in both situations.[72] In his opinion, the Court cannot overrule a precedent on the mere ground that it was wrongly decided.[73]

But because the Court had failed to establish a clear, or even consistent, criteria regarding the stare decisis factors throughout the years, Justice Kavanaugh volunteered his own framework. First, the decision at issue must be "grievously or egregiously wrong."[74] Second, the decision must have caused "significant negative jurisprudential or real-world consequences."[75] Lastly, overturning the decision must not lead to an undue disruption of reliance interests.[76] In effect, what is left is a two-step test in which the Court must perform a threshold test on the wrongness of the decision, and then a totality-of-the-circumstances test regarding its past and future impact.[77] Justice Kavanaugh fully admitted the limitations of his test, particularly that it cannot eliminate disagreements between different Justices about the same case.[78] When viewed in that light, perhaps the greatest merits of this approach lie in the trimming down of potential factors to consider whether to overturn precedent.

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[69] *Id.* at 1424 (Thomas, J., dissenting).

[70] *Id.* at 1423-24 (Thomas, J., dissenting).

[71] *Id.* at 1412 (Kavanaugh, J., concurring).

[72] *Id.* at 1413 (Kavanaugh, J., concurring).

[73] *Id.* at 1414 (Kavanaugh, J., concurring) ("To overrule, the Court demands a special justification or strong grounds.").

[74] *Ramos,* 140 S. Ct. at 1414 (Kavanaugh, J., concurring).

[75] *Id.* at 1415 (Kavanaugh, J., concurring).

[76] *Id.* (Kavanaugh, J., concurring).

[77] *Id.* (Kavanaugh, J., concurring).

[78] Specifically, the Court is bound to exercise discretion under this approach as well. *Id.* at 1415 (Kavanaugh, J., concurring) ("[A]pplying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis* factors.").

Justice Kavanaugh recognized the precedential force of *Apodaca*, but after applying his own test he concurred with the majority that it must be overturned.[79] Under Justice Kavanaugh's test: (1) *Apodaca* was egregiously wrong in view of the original meaning of the Sixth Amendment and prior and subsequent case law; (2) *Apodaca* caused serious negative consequences by enabling the conviction of individuals under an unconstitutional and racist rule, and; (3) overturning it would not overly upset reliance interests since the new rule would most likely not apply retroactively as a *Teague* exception.[80] In this manner, *Ramos* overturned *Apodaca*, but only under deeply confusing circumstances.

III. Deliberating the Future of *Stare Decisis*

A. DEFINING STARE DECISIS

It would be an understatement to conclude that it is difficult to make sense of what *Ramos* entails. It is even more challenging to predict what will follow in the field of constitutional law, particularly with respect to the principle of stare decisis. Known as the obligation to "stand by the thing decided and do not disturb the calm,"[81] stare decisis is widely accepted as a distinctive feature of common law systems.[82] In place to ensure that courts will decide similar cases in a consistent manner, in addition to promoting other crucial values, stare decisis is the legal principle for awarding precedential force to prior court decisions, and it transfers a court decision from the hands of the judge into the realm of either binding or strongly persuasive legal principles.[83] Put differently, stare decisis is what creates the notion of case law.[84] While precedent is respected in both common and civil law systems,

[79] *Id.* at 1416 (Kavanaugh, J., concurring).

[80] *Ramos,* 140 S. Ct. at 1419 (Kavanaugh J., concurring).

[81] This is the Latin translation of the maxim "*stare decisis et non quieta movere*." James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 B.U.L. REV. 345, 347 (1986).

[82] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 21 (1973).

[83] *See also* Rehnquist, *supra* note 81, at 347-48 (explaining that stare decisis is intended to promote values such as fairness, stability, predictability, and efficiency); Hughes, *supra* note 27 ("Its formal ideology offers strong allegiance to the notion of the binding force of precedent, on the theory that a legal system must protect settled expectations which would be dangerously disturbed if the highest courts were free to abandon positions that they had earlier declared with authority.").

[84] As mentioned above, prior decisions in civil law jurisdictions, while highly persuasive, do not carry precedential force in the sense that prior decisions do not serve as binding legal principles on the courts. FRIEDMAN, *supra* note 82, at 22 ("In Continental law, all law (in theory) is contained in the codes. In common law many basic rules of law are found nowhere but in the recorded opinion of the judges").

stare decisis is distinguishable from the civil law doctrine of *jurisprudence constante* because under stare decisis even a single prior decision can be binding on subsequent courts.[85]

To slightly digress, it is fascinating to trace the development of stare decisis in American jurisprudence since the Thirteen Colonies practically inherited the English legal system, including its preexisting case law and the doctrine of stare decisis.[86] As one might expect, English precedents were strictly adhered to even after the American Revolution, and the overarching attitude toward the common law was that its rules came from natural law and were already in place for judges to discover.[87] Because of this attitude courts were to strictly adhere to prior decisions, and as such judges did not "create" law.[88] But the situation transformed in the decades that followed. Riding on the emerging belief that the common law was merely based on the voluntary consent of individuals, "judges began to conceive of themselves as the leading agents of legal change," and simultaneously started to embrace their authority to reject precedents.[89] Eventually, courts were no longer intimidated by stare decisis.[90]

The law is by no means static, regardless of whether it takes the form of common or civil law. The law as it is now is unlikely to be held to be true in the future, for changes routinely take place in the form of a statute, case law, or other mediums. The law is constantly evolving and reflective of external circumstances, which are shaped by the social and political atmosphere surrounding the deliberation of each judge in rendering a final judgment. To accommodate for the living nature of the law, stare decisis must not be imposed as an absolute obligation.[91] In a sense stare decisis is a "compromise between the past and the future."[92]

But as is often the case with the law itself, stare decisis is noble in conception but flawed in execution. Courts' application of stare decisis

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[85] Fon & Parisi, *supra* note 26, at 524 (explaining that under *jurisprudence constante* precedent becomes a source of law only when there is a trend of similar decisions and a single decision by itself cannot achieve such effect).

[86] Rehnquist, *supra* note 81, at 348 (stating that stare decisis was carried over to the American Colonies).

[87] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 5-8 (1977).

[88] *Id.* at 9 (explaining that judges strictly followed precedent and saw their roles as discovering preexisting common law rules during the late Eighteenth Century).

[89] *Id.* at 23, 26.

[90] *Id.* at 30 (stating that judges thought of and used the common law to effectuate social change in the same manner as legislation).

[91] Hughes, *supra* note 27, at 20 ("The chains of precedent must not bind too tightly, and the doctrine of *stare decisis* is not unyielding.").

[92] Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767, 1777 (1996).

can be wildly unpredictable and deeply confusing, and some have openly questioned the actual extent of its role in the American legal system.[93] More gravely, stare decisis can be thoroughly abused, allowing judges to conveniently point to the doctrine as legal justification for promoting his or her personal view of how the particular law at issue should be.

In theory, of course, stare decisis requires courts to respect and uphold previous decisions notwithstanding whether they personally believe those decisions to be correct.[94] Though not codified in statute, stare decisis is a rule stemming from the general practice of the courts and the structure of the common law system. From a practical standpoint, stare decisis serves the purposes of "evenhandedness, predictability, and the protection and legitimate reliance."[95] From the train of thought offered by positivism, rules such as precedent are also crucial because they carry value as imposing obligations for judges to follow and restricting their discretion.[96]

While stare decisis has obvious merits, the requirement that courts shall uphold a previous decision "simply because of its pastness" and in spite of knowing it to be wrong creates serious causes for concern.[97] Needless to say, courts would have made no progress whatsoever throughout the legal history of the U.S. had they blindly upheld prior decisions only because certain cases came first, but courts have played a vital, active role in bringing about legal progress.[98] Despite support for stare decisis, the Court has also been celebrated for overturning prior decisions to promote developments in civil rights.

Confusingly, a consensus is lacking even on the precise boundaries of the notion of stare decisis.[99] To continue this discussion of *Ramos* and

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[93] Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 130 (2019). As this Article will explain, Justice Barrett is deeply critical of stare decisis as well.

[94] *Id.* at 126 ("[T]he expectation embodied in the idea of stare decisis is that judges of a court will, presumptively even if not conclusively, follow the previous decisions of that court—by hypothesis and by definition no higher in the judicial hierarchy—even if and when they think the previous decisions are mistaken.").

[95] *Ramos*, 140 S. Ct., at 1429.

[96] *See* Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. OF LEGAL STUD. 215, 215 (1987) ("Where a court is not bound by such a rule its decision always involves an exercise of discretion rather than compliance with any kind of obligation imposed by law.").

[97] Schauer, *supra* note 93, at 125.

[98] For a captivating account of this view in the context of the nascent decades of American legal development, *see generally* HORWITZ, *supra* note 87.

[99] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 763 (1988) ("The precedent has been viewed as limited to the "decision" on

its implications, we must broadly distinguish between two distinct forms of stare decisis. The first form is vertical stare decisis. The concept of vertical stare decisis is fairly straightforward and requires courts to adhere to decisions rendered by higher courts.[100] The other form is horizontal stare decisis, which requires courts to follow precedent rendered by that particular court.[101] Combined, vertical and horizontal stare decisis ensure that courts must heed their own past decisions or those by higher courts at all times.

Once an absolute requirement, stare decisis—particularly in its horizontal form—has dwelt in the territory of legal uncertainty in recent American jurisprudence. At times it is an unbending, unrelenting force of nature that precludes any deviations from the past. Then, at other times, it is a red-headed stepchild, ignored and dismissed by a judge for the purposes of actualizing a specific objective. Wildly, the role and application of stare decisis had fluctuated in this manner all the way to *Ramos*.

B. STARE DECISIS AT THE SUPREME COURT

In the case of the Supreme Court, vertical stare decisis is inapplicable since there is no higher court. The Supreme Court is the ultimate source of vertical stare decisis for lower courts and is itself only subject to horizontal stare decisis. Unfortunately, the interaction between *Apodaca* and *Ramos* highlights the difficult question of what constitutes precedent. Stare decisis sheds little light on this issue for future courts in instances where previous judges offered different lines of reasoning, and where there is no obvious guidance for defining the extent of essential criteria that constitute binding precedent.[102] As a result, there are no feasible means of accurately predicting when the Court will apply stare decisis and when stare decisis will be eschewed.[103] This is an open-ended, potentially grave question that has created a tenuous relationship between past decisions and the current Court.[104]

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the "material facts" as seen by the precedent, or the same as seen by the non-precedent court; for others, the term means the "rules" formulated by the precedent court; for still others, the term includes the reasons given for the rules formulated.").

100 Schauer, *supra* note 93, at 124-25.

101 Schauer, *supra* note 93, at 125 ("Horizontal precedent—stare decisis—is the obligation of a court to follow the previous decisions of the same court.").

102 Hughes, *supra* note 27, at 19.

103 Monaghan, *supra* note 99, at 743.

104 Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 261 (2005) ("How and when precedent should be rejected remains one of the great unresolved controversies of jurisprudence.").

As previously mentioned, as a general principle, the Court has traditionally given less weight to stare decisis in constitutional cases than in statutory cases.[105] Still, this does not mean the Court has no qualms about overturning its earlier constitutional cases. Rather, even in the realm of constitutional law, stare decisis remains the norm.[106] As evidenced by the fact that *Ramos* was the only decision to overturn constitutional precedent during the Court's previous term,[107] the consensus seems to be that stare decisis is still firmly entrenched in both theory and practice.[108]

Even then, because of the absence of vertical stare decisis, stare decisis cannot restrict the Court to the same degree that it binds lower courts. The doctrine's legal effect is therefore significantly limited at the Supreme Court compared to any other court.[109] The Court cannot strictly apply stare decisis in all situations because individual Justices essentially have discretion—albeit with some theoretical restrictions—on when to uphold existing precedent since there is no binding rule with respect to preexisting or closely related issues.[110] In reality, stare decisis has not prevented Justices from working around the doctrine to independently craft legal opinions of their liking,[111] despite persisting concerns that overturning precedent puts the Court's legitimacy in question.[112]

It is understandable then that some have called for the Court to completely abandon stare decisis,[113] while others have suggested that

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105 Agostini v. Felton, 521 U.S. 203, 235 (1997).

106 Freed, *supra* note 92, at 1776.

107 Valerie C. Brannon, et al., Cong. Research Serv., R46562, *Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court*, 12 (Oct. 6, 2020), http://crsreports.congress.gov/product/pdf/R/R46562.

108 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013) [hereinafter Barrett, *Precedent*].

109 *Id.* at 1713 ("In the Supreme Court, stare decisis is a soft rule; the Court describes it as one of policy rather than as an inexorable command.").

110 Perry, *supra* note 96, at 215 (explaining that courts always exercise at least some discretion if there is no binding rule).

111 Schauer, *supra* note 93, at 131 ("As long as there are available in the decisional toolbox of the Justices multiple ways of rationalizing the avoidance of a seemingly applicable previous decision, the existence of that decision seldom stands as a significant barrier to what seems now to the Court or to individual Justices as the better decision to make, precedent aside, for the case before them.").

112 For a succinct summary of this view, *see generally* Rehnquist, *supra* note 81, at 353-55. And perhaps no one is more concerned about the legitimacy of the Court than Chief Justice John Roberts. *See generally* Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice John Roberts, and Stare Decisis*, 43 HARV. J. L. & PUB. POL'Y 733 (2020).

113 Rehnquist, *supra* note 81, at 371-75.

Congress may abrogate stare decisis by statute.[114] Nevertheless, the Court cannot simply rid of stare decisis altogether because doing so would place the innate value of precedent at peril.[115] A number of other alternative suggestions have been raised, but none seem practical or even feasible.[116] Evidently, stare decisis will remain a legal quagmire for the Court in the future.

Against this backdrop, that some members of the Court declined to accept *Apodaca* as binding precedent is a startling notion.[117] *Apodaca* may very well have been an outlier in terms of the manner in which the Court was split and in its interpretation of the Sixth Amendment, but the implications of *Ramos* pertaining to stare decisis are nevertheless troublesome.[118] It might be true that Justice Powell's opinion stood on relatively shakier grounds than, say, a unanimous opinion by the Court. But there is certainly some merit to Justice Alito's argument that *Apodaca* was nonetheless binding as to its result. If a single Justice cannot bind the Court by agreeing with a group of four other Justices with respect to the result, would two Justices suffice? The lack of guidelines might give rise to a line-drawing problem because disagreements in the Court are to be expected.[119]

Drawing lines in the Court is becoming increasingly challenging because of the politicization of the Court.[120] To some, its politicization may very well be ominous.[121] From the doomed attempt to appoint then-circuit judge Merrick Garland, to the bitter appointment of the three Trump-appointees, there is valid concern that the Court has become no more than another political arena, especially in light of the

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[114] *See generally* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

[115] Freed, *supra* note 92, at 1780-81 ("[O]nce an absolute rule of stare decisis is dismissed, there is no objective yardstick for measuring adherence to the rule of precedent.").

[116] *See* Bradley S. Shannon, AMERICAN LEGAL PROCESS 504-05 (2015).

[117] It is also unclear whether Justice Sotomayor, Justice Kavanaugh, and Justice Thomas view the concurring opinion or plurality opinion of *Apodaca* to be binding. *Sixth Amendment—Right to Jury Trial—Nonunanimous Juries—Ramos v. Louisiana*, 134 HARV. L. REV. 520, 528-29 (2020) [hereinafter *Sixth Amendment*].

[118] *Cf.*, Freed, *supra* note 92, at 1780 (explaining that stare decisis can be diminished once Justices begin to treat precedent lightly).

[119] *Sixth Amendment*, *supra* note 117, at 520 (noting that "[p]lurality decisions are becoming more common" at the Court).

[120] Epps & Sitaraman, *supra* note 2, at 150 ("The predictable result is a Supreme Court whose Justices—on both sides—are more likely to vote along party lines than ever before in American history.").

[121] Epps and Sitaraman, *supra* note 2, at 151 ("[A] democracy that loses its confidence in law may not long survive.").

significance of each Court decision on American politics.[122] Although the battle at the Court begins with the nomination process—with some of the most recent confirmation hearings being downright ugly at times—once appointed, there is absolutely no question that the opinions of the Justices are shaped by their personal views and proclivities.[123]

In recent years, following the retirement of Justice Anthony Kennedy and prior to the confirmation of Justice Barrett, there was rising optimism that Chief Justice John Roberts might serve as the swing vote,[124] as well as corresponding skepticism.[125] Where the truth lies will be discovered in the following years, but at the most fundamental level, it is plausible that Justice Roberts will usually be found somewhere in the middle. The incompatible disagreements will originate from the extremes of the spectrum.[126]

On the liberal end of the spectrum, even without the late Justice Ginsburg, the Justices deemed by many to be living constitutionalists run the risk of going too far. For one thing, some have expressed hope that Justice Sotomayor will serve as a messenger for liberal Justices.[127] Alarmingly, Justice Sotomayor has been called upon for this role and celebrated for her non-academic appearances without regard to her specific views on the Constitution.[128] It is not that Justice Sotomayor will

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122 Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 ALA. L. REV. 785, 811 (2019) ("Now that most of our most important political questions are destined to be decided by judges rather than by legislatures or bureaucrats, those who seek political outcomes must care about the political preferences of the judges.").

123 Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era – The Rise of "Originalist" Judges*, 55 CAL. W. L. REV. 341, 346 (2019) ("[E]veryone understands that the "law they follow" is often dictated by their positions set along an ideological spectrum, which ranges from the conservative "originalist" interpretation of the Constitution to the liberal living "constitutionalist," i.e., a "living, breathing" document view of the Constitution.").

124 Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, THE NEW YORK TIMES (Jul. 10, 2020), https://www.nytimes.com/2020/07/10/us/supreme-court-term.html.

125 Victoria Bassetti, *John Roberts is an Institutionalist, Not a Liberal*, FINANCIAL TIMES (Jul. 1, 2020), https://www.ft.com/content/2248b2e3-b911-48ec-9eeb-632c0c26ab16.

126 As a reminder, only Justice Gorsuch, Justice Breyer, and the late Justice Ginsburg concluded that *Apodaca* was not precedent. The remaining six Justices agreed that *Apodaca* was indeed precedent, but only three of them believed that it should be upheld.

127 David Fontana, *The People's Justice?*, 123 YALE L.J. FORUM 447, 471 (2014) ("Sotomayor could make the message of liberal Justices more appealing by affiliating it with an appealing messenger.").

128 Whereas other Justices are similarly labeled as conservative or liberal, Justice Sotomayor seemingly does not even need the pretenses of referring to the Constitution to promote her liberal views. *Id.* at 473 ("Unlike Justice Scalia's originalism, Justice

lean toward rendering a liberal legal opinion because her jurisprudence and trained reading of the Constitution leads her down that path. She will probably do so because she is liberal *per se*, an observation that blurs the line between the law and the person applying it.[129] And the path Justice Sotomayor took in *Ramos* is no friend of stare decisis.[130]

On the other end, besides the old conservative vanguards Justice Thomas and Justice Alito,[131] the Trump-appointed Justices are still something of an unknown commodity.[132] Notably, both Justice Kavanaugh and Justice Gorsuch are adherents to the school of originalism, although how faithful they remain to the philosophy is debatable.[133] For Justice Kavanaugh, *Apodaca* undeniably carried precedential force, but the decision still deserved to be overturned.[134] Perhaps his new three-factor test is intended to simplify the process for overturning precedent to make it more convenient in future cases.[135] Nevertheless, it is interesting that those two originalist Justices—Justice Gorsuch and Justice Kavanaugh—ultimately voted to endorse jury unanimity, either by overturning or circumventing precedent, which, as previously discussed, is undoubtedly closer to the original understanding of the Sixth Amendment than the outcome of *Apodaca* was.[136]

Breyer's pragmatism, or even Justice Souter's fair reading model, there is little in what she states in her extrajudicial remarks that indicates a brave new theory of the Court or the Constitution.").

129 Justice Sotomayor has previously explained her approach to deciding cases in terms of her personal convictions rather than her constitutional views. *Id.* at 467.

130 Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 132 (2020) ("This standard would set a relatively low bar for overruling precedent in the criminal procedure realm.").

131 There is an argument that Justice Thomas, for what it is worth, would give "effectively no binding force to precedent." *Id.* at 132.

132 The emerging narrative has been that Justice Kavanagh or Justice Gorsuch could serve as the new swing vote, instead of Justice Roberts, when it comes to particular areas of the law. *See generally* Daniel Harris, *The New Swing Votes on the U.S. Supreme Court*, 114 NW. U. L. REV. 258 (2020).

133 *See generally* Addicott, *supra* note 123.

134 *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) (asking why the Court should "stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law, that allows convictions of some who would not be convicted under the proper constitutional rule, and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?").

135 *Cf.* Varsava, *supra* note 130, at 131 (Justice Kavanaugh's preference for streamlining the framework for overturning precedent might be to "clear the air for future decisions in which he plans to vote to overrule precedent").

136 From their perspective, perhaps *Apodaca* had to be overturned because it, in effect, involved the Court positively affirming a departure from the original meaning of the Sixth Amendment. Larsen, *supra* note 10, at 984 ("[O]riginalism typically is quite comfortable with change; its only enemy is change imposed by judges.").

For originalists such as Justice Gorsuch and Justice Kavanaugh, it could be that their self-prescribed duty is to correct the Court's jurisprudence in accordance with the original meaning of the Constitution.[137] *Apodaca*, for example, had to be overturned because it conflicted with the original meaning of the Sixth Amendment regarding jury unanimity.[138] But originalism is patently inconsistent with the Court-led social changes that have taken place over the past decades.[139] Thus the popular narrative post-*Ramos* that Justice Kagan may have sided with the dissenters in order ask them to respect stare decisis later down the road for cases involving abortion, LGBT, and other rights in a similar vein makes sense,[140] even though Justice Alito and Justice Roberts might not reciprocate because of their acknowledgement that *Ramos* itself is now binding precedent.[141]

All of these fundamental disagreements among the Court are likely to be aggravated by the passing of Justice Ginsburg—a defining figure in battling sex discrimination laws and a promoter of social change[142]—and her replacement by Justice Barrett. This replacement will lead to a worsening ideological clash between the Justices on significant social rights developments that were implemented and enforced directly by the Court during the Twentieth Century.[143] For liberals in particular, the current makeup of the Court is bound to be extremely concerning.[144]

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137 Barnett, *supra* note 104, at 269 ("Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place.").

138 *Ramos*, 140 S. Ct. at 1396-97.

139 *See* Monaghan, *supra* note 99, at 739.

140 Sam Berten, *The Long Game: Justice Kagan's Approach in Ramos v. Louisiana*, UNIVERSITY OF CINCINNATI LAW REVIEW (May 26, 2020), https://www.uclawreview.org/2020/05/26/the-long-game-Justice-kagans-approach-in-ramos-v-louisiana; Ed Whelan, *Justice Kagan and Stare Decisis*, NATIONAL REVIEW (Apr. 20, 2020) https://www.nationalreview.com/bench-memos/Justice-kagan-and-stare-decisis/.

141 *See* Varsava, *supra* note 130, at 132 ("[T]o the extent that *Ramos* has set a precedent about precedent, it is the Justices in the dissent who will feel most compelled to follow it going forward—after all, they apparently endorse a stricter approach to precedent than any of the other Justices.").

142 *See generally* Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J. L. & GENDER 251 (2009).

143 *See* Monaghan, *supra* note 99, at 728 ("In addition to *Brown*, it seems evident that the abortion cases, the reapportionment cases, and the sex discrimination cases are also inconsistent with any constrained conception of the original understanding.").

144 This was the case even before Justice Barrett's ascension from the Seventh Circuit. *See* Epps & Sitaraman, *supra* note **Error! Bookmark not defined.**, at 168 ("The new Supreme Court majority is arguably the most reliably conservative in history, and there is reason to believe it will strike down laws that progressives favor using doctrinal theories that are at least open to a serious question.").

Justice Gorsuch's degeneration of stare decisis in this context might cause even greater doubts. Where the Justices diverge greatly on their views on a particular case or issue, stare decisis is capable of performing a crucial role by mediating between the two extremes and enabling them to sidestep certain delicate legal issues.[145] Stare decisis would thus effectively act as an equalizer by forcing Justices with contrasting opinions to grudgingly agree to maintain the status quo out of respect for precedent. With a blatantly conservative Court, however, liberal circles fear that many of the Court-led social changes could be undone.[146] Whether their fear will hold true is yet to be determined.[147]

For instance, at the end of *Ramos* Justice Gorsuch concluded the majority opinion by stating, "it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right."[148] But the nine Justices currently sitting on the Court will unquestionably disagree on what is right or wrong, and with their conflicting views, stare decisis alone will be insufficient to lead them into reaching an agreement. Since it is plausible that one or more vacancies will occur in the near future, this predicament could worsen because of the disparity between the rising influence of the Justices and the difficulty of accurately ascertaining their political preferences before appointment.[149] And if Justices can circumvent stare decisis altogether, à la Justice Gorsuch in *Ramos*,[150] an even murkier

[145] *See generally*, *Precedent*, Barrett, *supra* note 108, at 1716-25. Stare decisis could also mediate between Justices with conflicting opinions by allowing them to opt for the status quo so that the issue may be addressed again in the future. *See* Barrett, *Precedent, supra* note 108, at 1724.

[146] Joan Biskupic, *The Supreme Court Hasn't Been this Conservative Since the 1930s*, CNN, Sept. 26, 2020, https://edition.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html; Adam Liptak, *Barrett's Record: A Conservative Who Would Push The Supreme Court To The Right*, N.Y. TIMES, Nov. 2, 2020, https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html.

[147] So far, the liberal side of the Court attained a noteworthy victory in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In that case, the majority, against three dissenting Justices in Justice Alito, Justice Kavanaugh, and Justice Thomas, held that employers may not fire employees for being gay or transgender under Title VIII of the Civil Rights Act of 1964. *Id.* at 1754. That, of course, was before Justice Barrett's confirmation.

[148] *Ramos*, 140 S. Ct. at 1390, 1408.

[149] Kidd, *supra* note 122, at 811.

[150] Varsava, *supra* note 130, at 132-33 (explaining that both the majority and the dissenting Justices are likely to follow the "relaxed doctrine of precedent").

future might be waiting ahead for the Court in light of Justice Barrett's views on stare decisis.[151]

C. ENTER JUSTICE BARRETT: WHAT COMES AFTER *RAMOS*?

Ramos laid the groundwork for hacking away at the notion of what constitutes precedent, and what happens from here will heavily depend on Justice Barrett. During her nomination and confirmation process much was made of her religious upbringing and personal views.[152] Many believed those factors telegraphed a willingness—if not intent—to overturn the Court's previous rulings on issues such as the Affordable Care Act or abortion.[153] These concerns stemmed from the widely accepted perception of Justice Barrett,[154] famously known for being a former law clerk of Justice Scalia,[155] as a staunch originalist and textualist.[156] In her own words, Justice Barrett's legal philosophy can be summarized as the belief that "the meaning of the constitutional text is fixed at the time of its ratification" and the historical meaning of the text should be controlling.[157]

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151 This is separate from the intriguing and confusing inquiry of whether "*Ramos* could be applied to *Ramos* itself to justify a departure from the *Ramos* approach to precedent." Varsava, *supra* note 130, at 133.

152 For a succinct summary of Justice Barrett's upbringing, *see generally* Elizabeth Dias et al., *Rooted in Faith, Representing a New Conservatism*, N.Y. TIMES, Oct. 11, 2020, https://www.nytimes.com/2020/10/11/us/politics/amy-coney-barrett-life-career-family.html.

153 Amy Goldstein & Alice Crites, *Judge Barrett's writing criticizes the Supreme Court decision upholding Obama-era health law*, WASH. POST, Sept. 29, 2020, https://www.washingtonpost.com/health/judge-barrett-aca-health-care-law/2020/09/28/429d165e-ff4c-11ea-b555-4d71a9254f4b_story.html; Emma Green, *No One Likes Amy Coney Barrett's Abortion Answer*, THE ATLANTIC, Oct. 13, 2020, https://www.theatlantic.com/politics/archive/2020/10/amy-coney-barrett-roe-v-wade/.

154 Barrett, *Precedent*, *supra* note 108, at 1075 ("Reliance interests count, but they count far less when precedent clearly exceeds a court's interpretive authority than they do when precedent, though perhaps not the ideal choice, was nonetheless within the court's discretion.").

155 On Justice Scalia, she previously stated, "[h]is judicial philosophy is mine too." *Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States*, TRUMP WHITE HOUSE ARCHIVE, https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states/ (last visited Mar. 31, 2021).

156 Upon her nomination, Justice Barrett affirmed this perception that a "judge must apply the law as written," while former President Trump added that she "will decide cases based on the text of the Constitution as written." *Id.*

157 Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 J. CONST. L. 1, 5 (2016).

Understandably, Justice Barrett's originalist views have been criticized for being badly outdated and logically inconsistent.[158] And despite Justice Barrett's ardent defense,[159] Justice Scalia's purported "pragmatic" application of originalism was in itself inherently discretionary.[160] This was no more evident than in his wish to ignore the Ninth Amendment altogether.[161] But with life tenure and a solidly conservative majority now occupying the Court, whatever logical holes that can be found in originalism will have very little consequences outside of the academic circle.

So what does Justice Barrett, the author of several articles on the topic, think of stare decisis? Justice Barrett's articles yield the conclusion that her views on stare decisis have been remarkably consistent, and that she has been anything but a proponent for its rigid application. First, she is skeptical that stare decisis is a firmly established rule with deep historical roots.[162] The notion of a single case binding successive courts,[163] Justice Barrett argues, pales in comparison to the civil law system in which only a series of similar holdings can

158 Erwin Chemerinsky, *The Philosophy That Makes Amy Coney Barrett So Dangerous*, N.Y. TIMES, Oct. 21, 2020, https://www.nytimes.com/2020/10/21/opinion/supreme-court-amy-coney-barrett.html. The existence of the U.S. Air Force would be unconstitutional under a textualist and originalist interpretation of the Constitution. Angus King Jr, *Amy Coney Barrett's Judicial Philosophy Doesn't Hold Up to Scrutiny*, THE ATLANTIC, Oct. 25, 2020, https://www.theatlantic.com/ideas/archive/2020/10/originalism-barrett/616844. For her part, Justice Barrett believes the creation of the U.S. Air Force is a "super precedent" created by Congress and the President. Barrett & Nagle, *supra* note 157, at 24-25.

159 Justice Barrett especially insists that Justice Scalia was selective in overturning precedent. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1933 (2017) [hereinafter Barrett, *Originalism*] ("He was willing to overrule precedent outright in the above cases because he thought that the error was clear and that traditional stare decisis factors like reliance or workability counseled it.").

160 Notably, Justice Scalia himself confessed that totality of the circumstances tests are inevitable to a certain extent. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989). Justice Scalia also once wrote that "no reasonable jury could conclude otherwise" regarding the applicable facts when not even all nine members of the Court had agreed. Scott v. Harris, 550 U.S. 372, 386 (2007).

161 Ken Levy, *Why the Late Justice Scalia Was Wrong: The Fallacies of Constitutional Textualism*, 21 LEWIS & CLARK L. REV. 45, 69–70 (2017) ("Apparently, Justice Scalia's meta-constitutional position was that when the facts inconveniently threaten your constitutional theory, simply pick different facts.").

162 Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1065 (2003) [hereinafter Barrett, *Stare Decisis*] (explaining that stare decisis is deemed to be a relatively modern rule in American jurisprudence).

163 Justice Barrett is presumably critical of this notion. *See* Barrett and Nagle, *supra* note 157, at 43 ("The question whether settled precedents constitute "law" in a positivist sense is a complicated jurisprudential one that we do not tackle.").

carry precedential force.[164] Second, she is of the view that the application of stare decisis, even with regard to statutory cases, should be limited.[165] Third, she frowns upon stare decisis's practicality because she believes it limits the number of arguments litigants could raise in their own case,[166] and therefore, it must be applied in a flexible manner.[167] As did her ideological mentor Justice Scalia, Justice Barrett simultaneously acknowledges a tension between stare decisis and originalism,[168] and would unwaveringly strike down a case she believes to be in conflict with the Constitution.[169] Where the conflict is demonstrable, Justice Barrett would give little, if any, weight to reliance interests.[170]

But unlike Justice Scalia, who reconciled this conflict by labelling stare decisis as a pragmatic exception to his views,[171] Justice Barrett does so by perceiving—or construing—a harmony between originalism and stare decisis.[172] Because the Constitution is the "original precedent," she concludes there is no *per se* conflict between the principles of stare decisis and originalism.[173] If a decision is consistent with the originalist reading of the Constitution, then all is right in Justice Barrett's world. To the extent that there is any inconsistency, the originalist reading of the Constitution must prevail as the original precedent. By restoring the text and original meaning of the Constitution, a judge therefore does not disregard stare decisis, but in

164 Justice Barrett seems almost envious of the civil law approach. *See* Barrett, *Stare Decisis*, *supra* note 162, at 1067, 1072-1073 (stating that in a civil law system "[T]he court's only real tools for gauging the persuasiveness of an argument are the litigants' arguments and the original text" and like *jurisprudence constant*e, a line of judgments is what gives a rule precedential force because "[i]t is the existence of the line of cases, not any one case, that gives a proposition its force").

165 Barrett, *Statutory Stare Decisis*, *supra* note 52, at 352 (arguing that there is no reason for statutory stare decisis at the circuit court level to be "anything more than the simple presumption against overruling that all opinions enjoy").

166 Barrett, *Stare Decisis*, *supra* note 162, at 1075 (criticizing the role of stare decisis because "litigants are bound to results obtained by those who have gone before them").

167 Barrett, *Stare Decisis*, *supra* note 162, at 1013.

168 Barrett, *Precedent*, *supra* note 108, at 1724.

169 Barrett, *Precedent*, *supra* note 108, at 1728 ("I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.").

170 Barrett, *Stare Decisis*, *supra* note 162, at 1062.

171 Barrett, *Originalism*, *supra* note 159, at 1921–22.

172 Barrett, *Originalism*, *supra* note 159, at 1923 ("Originalism thus places a premium on precedent, and to the extent that originalists reject the possibility of deviating from historically-settled meaning, one could say that their view of precedent is particularly strong, not as weak as their critics often contend.").

173 Barrett, *Originalism*, *supra* note 159, at 1924.

fact adheres to the ultimate precedent. The fact that Justice Barrett does not see a conflict here means she would have fewer reservations than her mentor about overturning precedent.

Nevertheless, according to Justice Barrett, the concerns surrounding the conservative shaping of the Court may very well be overblown because there are safeguards in place that would limit the number of challenges to duly established precedent.[174] Conveniently, stare decisis cannot clash with originalism if the question of whether such "super precedent" contravenes the Constitution does not arise in the first place.[175] Nor can the Court arbitrarily overturn previous cases in defiance of the general public's strong support for them.[176]

But critically, Justice Barrett candidly recognizes how the Court has discretion to hear cases of its choice.[177] Thus while the Court would generally refrain from accepting cases on which the general public has reached a universal consensus, it has discretion to hear those it believes to be in the gray zone. And as far as she is concerned, although originalism does not obligate a Justice to eliminate all past decisions he or she disagrees with, even duly established precedent is not immune.[178] Moreover, it is evident that Justice Barrett does not deem cases such as

[174] Barrett, *Originalism*, *supra* note 159, at 1929 ("A combination of rules—some constitutional, some statutory, and some judicially adopted—keep most challenges to precedent off the Court's agenda.").

[175] Justice Barrett's view is that super precedent is created not by stare decisis but by its duly established status. Barrett and Nagle, *supra* note 157, at 22–23. Barrett and Nagle, *supra* note 157, at 16–17 (explaining that the criticism of originalism as misaligning with its principles with respect to super precedent is "contrived").

[176] Barrett, *Precedent*, *supra* note 108, at 1736 (explaining that strong public support in cases such as *Brown v. Board of Education* prevents any challenges from reaching the Court).

[177] Barrett, *Originalism*, *supra* note 159, at 1930 ("[T]he Court's discretionary jurisdiction generally permits it to choose which questions it wants to answer."); Barrett, *Stare Decisis*, *supra* note 162, at 1015-16.

[178] Barrett & Nagle, *supra* notes 157, at 20, 22 (explaining that a Justice has discretion over seeking to overturn even super precedents despite the aforementioned safeguards in place).

Roe v. Wade [179] or *Planned Parenthood v. Casey* [180] to be super precedents,[181] as opposed to *Marbury v. Madison*,[182] for example.[183]

Returning to the case at hand, while it is difficult, if not impossible, to accurately predict how she would have voted as a Supreme Court Justice, we may nevertheless attempt to ascertain which side Justice Barrett might have joined in *Ramos*.[184] Judging by her own words, Justice Barrett's analytic checklist should consist of applicable precedent, and then the textualist and originalist readings of the Sixth Amendment.[185] The threshold question is whether Justice Barrett would have deemed *Apodaca* to be binding precedent.[186] On this point, common sense suggests she would have sided with Justice Gorsuch considering *Apodaca*'s status as an obvious outlier in the Court's jurisprudence and the peculiar nature of Justice Powell's opinion.[187] Turning to the textualist and originalist analyses, determining how Justice Barrett might have opined becomes far more difficult because unlike the original meaning of the term "impartial," as recognized by the *Ramos* majority, the plain text of the Sixth Amendment does not require jury unanimity.[188] In that sense there is a clash between a textualist reading and an originalist one,[189] which means we have reached the point where the general principle has gone "as far as it can go in

[179] Roe v. Wade, 410 U.S. 113 (1973).

[180] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[181] *See, e.g.*, Barrett, *Originalism*, *supra* note 159, at 1932, n.52; Barrett, *Precedent*, *supra* note 108, at 1735, n.141. During her confirmation hearings, Justice Barrett pointed to the fact that *Roe v. Wade* is continuously at the center of debate as proof it has not achieved super precedent status. Brian Naylor, *Barrett Says She Does Not Consider Roe v. Wade 'Super-Precedent,'* NAT'L PUB. RADIO (Oct. 13, 2020), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent. At the same time, it has been pointed out that Justice Barrett's purported dedication to originalism should, in theory, lead her to conclude that super precedents such as *Brown v. Board* should be overturned as well. *See* King Jr. & Richardson, *supra* note 158.

[182] Marbury v. Madison, 5 U.S. 137 (1803).

[183] Justice Barrett offered the following Supreme Court decisions as examples of super precedents which are extremely unlikely to be overturned: *Marbury v. Madison*, *Martin v. Hunter's Lessee*, *Helvering v. Davis*, the *Legal Tender Cases*, *Mapp v. Ohio*, *Brown v. Board of Education*, and the *Civil Rights Cases*. Barrett & Nagle, *supra* note 157, at 14.

[184] *See* Brannon et al., *supra* note 107, at 5-7.

[185] *See* Brannon et al., *supra* note 107, at 20 (quoting Justice Barrett's response during her confirmation hearing for the Seventh Circuit).

[186] *See* Brannon et al., *supra* note 107, at 20 (quoting Justice Barrett as stating whether precedent settles the issue is the preliminary question).

[187] *See* Barrett, *Stare Decisis*, *supra* note 162, at 1073.

[188] Mosvick & Mosvick, *supra* note 36, at 310-11.

[189] Even critics of the holding of *Ramos* agree that the requirement of jury unanimity was the consensus at least in 1791. Mosvick & Mosvick, *supra* note 36, at 323.

substantial furtherance of the precise statutory or constitutional prescription." [190] All that is left is for Justice Barrett to exercise discretion, for which there are no means of accurately ascertaining her thoughts. Such discretion, rather than concrete legal principles, will likely decide a great number of social and political issues for decades to come.

The best we can do to try to trace her thoughts is to turn to some of the opinions Justice Barrett personally penned during her short stay at the Seventh Circuit.[191] For that purpose her dissenting opinions might be more illuminating than any majority or concurring opinion. [192] Although *Apodaca*'s status as an obvious outlier would likely preclude Justice Barrett from acknowledging it as binding precedent, her dissenting opinion in *Schmidt v. Foster*[193] suggests she would construe the holding of *Apodaca* quite narrowly even if she were to consider it precedential. To briefly summarize her dissenting opinion in *Schmidt*, Justice Barrett diverged from the majority on whether the Supreme Court's precedent on the right to counsel at a "critical stage" under the Sixth Amendment applied to the petitioner's situation.[194]

In *Schmidt*, the petitioner was charged with first-degree intentional homicide and raised a provocation defense; as a result, the judge decided to preliminarily question the petitioner in-person to assess the validity of the petitioner's claim.[195] Ultimately, the judge denied the motion to present a provocation defense after questioning the petitioner in his chambers in the presence of the petitioner's counsel—who did not speak—and without the prosecutor.[196] Based on these

[190] Scalia, *supra* note 160, at 1183.

[191] In roughly three years, Justice Barrett wrote about 100 majority, concurring, and dissenting opinions. Adam Feldman, *Empirical SCOTUS: A Comprehensive Look at Judge Amy Coney Barrett*, SCOTUSBLOG (Oct. 9, 2020), https://www.scotusblog.com/2020/10/empirical-scotus-a-comprehensive-look-at-judge-amy-coney-barrett/. *See* Barrett, *Precedent*, *supra* note 108, at 1717 (stating that a Justice's "approach to the Constitution becomes evident in the opinion she writes.").

[192] It is the shared opinion of liberal and conservative Justices alike that they can most clearly and strongly express their legal reasoning in dissenting opinions. *See* William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986) ("[W]here significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it."); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 7 (2010) ("[A]lthough I appreciate the value of unanimous opinions, I will continue to speak in dissent when important matters are at stake."); Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 42 (1994) (stating that is a pleasure "[t]o be able to write an opinion solely for oneself").

[193] Schmidt v. Foster, 891 F.3d 302 (7th. Cir. 2018).

[194] *Id.* at 321 (Barrett, J., dissenting).

[195] *Id*. at 306-07.

[196] *Id*. at 307-08.

facts, the majority held the judge's rejection of the defense was contrary to Supreme Court precedent,[197] and deprived the petitioner of his right to counsel under the Sixth Amendment during a critical stage of the proceeding.[198]

In her dissenting opinion, however, Justice Barrett interpreted the relevant Supreme Court cases differently and more narrowly, reaching the conclusion that precedent on what constitutes a critical stage is strictly limited to "adversarial confrontations between the defendant and an agent of the State."[199] Since the prosecutor was not present for the interrogation within the judge's chambers and the judge acted in a neutral rather than adversarial manner, Justice Barrett disagreed with the majority that the interrogation was a critical stage.[200] What we might take from *Schmidt* is that Justice Barrett, faithful to her general disinclination for stare decisis, would lean toward construing any applicable precedent extremely narrowly where it does exist.[201]

Justice Barrett's dissenting opinion in the 2019 case of *Kanter v. Barr*[202] could offer further hints as to how she might determine the original meaning of the Constitution. In *Kanter*, the Wisconsin state and federal statutes at issue prohibited all persons convicted of a crime punishable by imprisonment for more than one year from possessing firearms.[203] The statutes' reach covered the petitioner, who had previously been convicted and imprisoned for one year and one day for a non-violent crime.[204] Applying the post-*Heller* two-part test,[205] the majority looked to historical evidence of non-violent felons being

197 *Id*. at 314 ("By looking both at what the Supreme Court has done and at what it has said, it is clear that an evidentiary hearing on a contested substantive issue is a critical stage of the proceedings.").

198 *Id*. at 319-20.

199 *Schmidt*, 891 F.3d at 321.

200 *Id.* at 321, 327-28.

201 Still, as *Ramos* concerned the exact same issue as *Apodaca*, it would have been difficult for her to distinguish between the two. The factual differences worth noting can be summarized as the crimes the petitioners were charged with, with *Apodaca* featuring assault, burglary, and grand larceny instead of murder, and that one of the petitioners in *Apodaca* was convicted by an 11-1 vote rather than 10-2. *See Apodaca*, 406 U.S. at 405-06.

202 *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019).

203 *Id*. at 439.

204 Specifically, the petitioner had faced up to twenty years for mail fraud. *Id*. at 440.

205 In assessing the constitutionality of a statute restricting the right to bear firearms, the Court conducts a textual and historical analysis on whether the regulated activity is within the scope of the Second Amendment, and if not, the Court then balances the justification for regulating the activity with an individual's rights under the Second Amendment. *Id*. at 441 (explaining the *Heller* test).

prevented from exercising their Second Amendment rights, before ultimately upholding the constitutionality of the statutes.[206]

The majority's historical analysis invited strong disagreement from Justice Barrett. In her view, her colleagues on the bench were mistaken in suggesting that felons may not have had the right to bear arms per the original understanding of the Second Amendment.[207] Validating the constitutionality of the concerned statutes through a historical analysis would require the existence of "founding-era laws explicitly imposing—or explicitly authorizing the legislature to impose—such a ban," none of which Justice Barrett believed existed.[208] Placing utmost significance on the plain text of the Second Amendment,[209] Justice Barrett narrowly read the proposals made in the few states that provided "the only evidence coming remotely close" to such laws and declined to view them as supporting a restriction on the right of nonviolent felons to bear firearms.[210]

Reading *Schmidt* and *Kanter* together, a couple of observations can be drawn. First, Justice Barrett seems likely to lean toward interpreting applicable precedent and facts on the narrowest possible grounds. Consistent with her views on stare decisis, this might be an attempt to limit the binding effect of precedent as much as possible. Second, as expected, Justice Barrett will heavily rely on the text of the Constitution in construing it, perhaps even over its historical context. That would especially be the case if, as with the legislative history of the Sixth Amendment, there is ample room to argue both ways.[211] Applied to *Ramos*, the first point is irrelevant because *Apodaca*'s status as an obvious outlier and the ambiguity of whether the *Marks* rule should apply to Justice Powell's opinion would enable her to avoid applying *Apodaca* as binding precedent. Even though it would be nearly

206 While noting how the Seventh Circuit has suggested that the original meaning of the Second Amendment was to award the right to bear arms to only virtuous citizens, the inconclusive historical evidence allowed the majority to proceed to the second step of the inquiry. *Id*. at 445-47.

207 Justice Barrett summarized her opinion of the issue of this case as "the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all." *Id*. at 453.

208 *Kanter*, 919 F.3d at 454.

209 New Hampshire, Massachusetts, and Pennsylvania each submitted proposals that contained language restricting the right of felons to bear arms, but Justice Barrett downplayed them based on a textualist argument that "none of the relevant limiting language made its way into the Second Amendment." *Id*. at 455.

210 *Id*. at 454, 458 (concluding that the restriction on the right to bear arms pertained to individuals posing "a threat to the public safety" instead of all felons in a categorical sense).

211 *Apodaca*, 406 U.S. at 409 (stating that "one can draw conflicting inferences from this legislative history").

impossible to distinguish the holding of *Apodaca* from that of *Ramos*, Justice Barrett would, in all likelihood, simply refuse to give stare decisis treatment to *Apodaca*. Rather, the second point would presumably control Justice Barrett's analysis, and the reality of the requirement of jury unanimity being absent in the final text could persuade Justice Barrett to disagree with the majority in *Ramos*.[212] Justice Barrett might reason that jury unanimity in state courts is not in line with the "original precedent." But in the end, any predictions as to what Justice Barrett might have done are not, and simply cannot be predicated upon exact science. Depending on who you ask, that is the beauty, or innate shortcoming, of law.

IV. Conclusion

"It is my job to apply the law," Justice Oliver Wendell Holmes is famously said to have declared in response to Judge Learned Hand's request that the towering legal figure "[d]o Justice."[213] The unfortunate truth is that such a simple and noble task becomes exponentially more difficult when there is no agreement on how the law should be applied, or even what the law is.

The direct impact of *Ramos* is certainly forthcoming.[214] As feared by Justice Alito, defendants previously convicted by nonunanimous juries in Louisiana and Oregon have asked for or might yet seek new trials.[215] Beyond that, however, *Ramos* is not only bound to bring collateral but potentially overreaching, long-term ramifications. The Court's treatment of stare decisis is disturbing for that reason. On one hand, Justice Gorsuch has devised a means for circumventing the precedential status of oddly split decisions that otherwise might have

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[212] As mentioned above, the absence of the requirement in the final text was part of the basis for the plurality's conclusion. *Id.* at 410. Justice Barrett voting in Justice Ginsburg's place would not have changed the outcome of *Ramos*. Nonetheless, Justice Barrett's presence could have made a difference by swaying some of the Justices who sided with the majority. After all, the Court is most likely to overturn existing precedent when new Justices have joined. Barrett, *Precedent*, *supra* note 108, at 1729, 1734-35.

[213] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6 (Free Press) (1990).

[214] Another potential consequence is that *Ramos* has put the *Marks* Rule in limbo. *See generally Sixth Amendment*, *supra* note 117.

[215] Matt Reynolds, *Oregon and Louisiana Grapple With Past Criminal Convictions Made With Split Verdicts*, ABA JOURNAL (Oct. 1, 2020), https://www.abajournal.com/magazine/article/after-ramos-decision-oregon-and-louisiana-grapple-with-split-verdicts. The scope of *Ramos*'s impact will heavily hinge upon the Court's decision in *Edwards v. Vannoy*, which will answer the question of whether it passes the *Teague* test. *See* Howe, *supra* note 61.

been protected by the *Marks* rule.[216] On the other hand, Justice Kavanaugh has evinced his willingness to overturn prior decisions provided that he deems the circumstances to be appropriate, and has gone as far as to offer his own framework for doing so.[217]

While honorable in thought and delivery, Justice Roberts's famous declaration that there are no "Obama judges or Trump judges, Bush judges or Clinton judges," is frankly questionable.[218] Indeed the clear facts surrounding the rulings of the Court in recent decades suggest otherwise. As a result, further battles are undeniably set to follow in the Court and there is no question that the legal battlefield will closely reflect the split in the American political and social atmosphere. And in this battle, "the norm of stare decisis itself has been weaponized," but stare decisis can function properly "only if those who wield the weapon of stare decisis would be willing to accept the bitter with the sweet."[219]

A number of significant decisions loom on the horizon for the Court, and as *Ramos* itself shows, old battlefields can be easily renewed.[220] While intended to provide assurance that "bedrock principles are founded in the law rather than in the proclivities of individuals," stare decisis cannot account for the proclivity of the individuals holding the ultimate authority to wield it.[221] In reality, consistency or predictability simply has not been found in the Court's jurisprudence on stare decisis.[222] Unfortunately, *Ramos* suggests that this issue will be made even more obvious in the years to come.[223] With the political and social

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216 Varsava, *supra* note 130, at 131.

217 Varsava, *supra* note 130, at 131.

218 *See* Addicott, *supra* note 123, at 360 (arguing that different judges will interpret laws differently depending on which president appointed them).

219 Schauer, *supra* note 93, at 140-41.

220 Most notably, the Supreme Court will rule on the latest challenge to the constitutionality of the Affordable Care Act in *California v. Texas* (Docket 19-840), determine whether the community caretaking exception to the Fourth Amendment permits warrantless searches of one's home in *Caniglia v. Strom* (Docket 20-157), and decide if the Eight Amendment requires trial courts to find juveniles to be incorrigible to render life sentences in *Jones v. Mississippi* (Docket 18-1259).

221 Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

222 Schauer, *supra* note 93, at 140 ("[T]here does not appear to be any who have demonstrated the ability to combine their accusations of ignoring stare decisis with a willingness to adhere to stare decisis when its effect is to reinforce or perpetuate decisions they believe mistaken, or to support their sometimes vehemently professed adherence to stare decisis with a willingness to relinquish their own proclivity to persistent dissent.").

223 Justice Gorsuch and Justice Alito recently expressed strong disagreement with the Court's refusal to review a challenge to existing precedent. Jason Small v. Memphis Light, Gas & Water, 593 U.S. ___ (2021) (Gorsuch, J., dissenting).

atmosphere surrounding the Court continuing to diverge in both extremes, the end of this turmoil is nowhere near in sight.

As an ending note, this Article will offer two claims, both by Justice Alito, on the principle of stare decisis. In *Ramos*, Justice Alito made a spirited defense of the notion, arguing that "[t]he doctrine should not be transformed into a tool that favors particular outcomes."[224] Yet, less than a year before *Ramos*, while writing for the majority in *Janus v. AFSCME*[225] to overturn *Abood v. Detroit Board of Education*[226] on the basis of the First Amendment, the same Justice Alito who so fiercely fought for the "enormous reliance" of just Oregon and Louisiana on *Apodaca* also wrote that the reliance of over twenty states on *Abood* "is not a compelling interest for *stare decisis*."[227] To make matters even more interesting, Justice Breyer, Justice Ginsburg, and Justice Sotomayor had all disagreed, perhaps even "angrily" with Justice Alito and the rest of the majority.[228] In *Ramos*, by merely switching roles, these Justices seemingly and eerily found themselves in *The Twilight Zone*.[229] And Justice Barrett has now arrived on set.

224 *Ramos*, 140 S. Ct. 1390, 1432 (Alito, J., dissenting).

225 Janus v. AFSCME, 138 S. Ct. 2448 (2018).

226 Abood v. Detroit Board of Education, 431 U.S. 209 (1977). This case permitted labor unions to require non-members to pay union dues.

227 *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting); *Janus*, 138 S. Ct. at 2485, n.27.

228 Schauer, *supra* note 93, at 137 (summarizing Justice Kagan's dissenting opinion which criticizes Justice Alito's majority opinion).

229 Specifically, the author is referring to an episode from the TV series, The Twilight Zone, titled "Shadow Play." For those who have not watched this particular episode and would not mind having its plot spoiled, the male protagonist is sentenced to death by a court but laughingly dismisses the verdict, claiming that he is merely having a recurring nightmare. At the end of the episode, his claim turns out to be true, as the man once again finds himself in another trial after he had been executed in the previous scene, with the same characters now playing different roles at this subsequent trial.